Nos. 86-179, 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,
Appellants,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellants,

v.

CHRISTINE J. AMOS, *et al.*,
Appellees.

On Appeals from the United States District Court for the District of Utah

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REPLY BRIEF IN NO. 86-179

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TABLE OF AUTHORITIES

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The basic defect in appellees' brief is that it ignores the narrowness of the question presented in this case. This is not a case in which a legislature, starting from ground zero, conferred upon religious entities a benefit that is available to no one else. It is a case in which Congress imposed obligations on all employers, including religious employers, not to discriminate on the basis of race, color, sex or national origin. But, with respect to religious preference hiring, Congress exempted religious employers in order to avoid what it correctly perceived

as serious constitutional questions that the legislation otherwise would raise. Once this valid purpose is recognized, appellees' case is reduced to little more than an assertion that Congress has acted unconstitutionally because its legislation did not go as far as the appellees would have hoped. What if Congress in 1972 had simply repealed Title VII? Obviously, no constitutional guaranty would be violated. When, as here, Congress acts with a valid secular purpose—advancing free exercise values and avoiding Establishment Clause problems—and when its choice entangles government with religion less than the alternatives, it should enjoy broad discretion to decide how much employment discrimination it wants to prohibit.

Appellees have not directly addressed this fundamental legal point. Instead, their attack on the constitutionality of Section 702 proceeds mainly from two erroneous and misleading factual points.

First, contrary to the claims of appellees, this is not a case in which the Mormon Church has attempted to use economic leverage to further its religious beliefs. Instead, the district court found that "there is no evidence in this case that the defendants are using or ever would use Section 702 to further [their] religion." (J.S. App. 73a n.69.) Thus, the district court did not find—and could not have found—that appellee Mayson's free exercise rights were implicated by the Church's activities, much less violated by any *governmental* policy. Second, again contrary to the claims of appellees, this is not a case in which the Church has attempted to gain an unfair competitive advantage over other commercial enterprises by means of reliance on an exemption from federal law. It is undisputed on the record that the activities involved in this case—Deseret Gymnasium, Deseret Industries and Beehive Clothing Mills—are subsidized by the Church. Moreover, it is undisputed that the Church's policy of employing only its members who are eligible for a temple recommend is applied only to its non-profit ac-

tivities and *not* to commercial enterprises which the Church owns. Accordingly, two of appellees' principal arguments are founded on fundamentally false factual premises.

1. In the opening brief, we argued (CPB Br. 17-23) that the district court's invalidation of the amended Section 702 and its application of Title VII to the Mormon Church's employment practices generally, and at Deseret specifically, infringed appellants' free exercise rights in two ways: (1) it overrode the Church's sincere beliefs about how best to further its religious objectives, and (2) it invaded the Church's autonomy. Further, the court advanced no compelling interest found in either the Constitution or any statute to justify this intrusion. Accordingly, in the circumstances of this case, Section 702, by protecting those freedoms, did not establish religion in violation of the First Amendment.

a. Appellees' initial response is that there is no infringement of the free exercise of religion because the Mormon Church has not uniformly applied its policy of hiring only those eligible for a temple recommend in those non-profit activities of the Church which are related to the achievement of religious objectives.[1] But this response, by itself, is irrelevant to the appropriate inquiry under the Free Exercise Clause.

The initial issue in a proper free exercise analysis is whether the action appellees and the district court seek to prohibit constitutes "merely a matter of personal preference." *Wisconsin* v. *Yoder*, 406 U.S. 205, 216 (1972). There is no question that the basic employment policy of the Church in its non-profit activities and the appli-

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[1] Appellees make much of one instance in which this policy was not applied to a squash teacher at Deseret. The record shows that the reason for this exception was Mr. Khan's special qualification for a particular task. (R. XI at Ex. 20.) *See also* affidavit of Borchert (R. XIV at 122.) Certainly, the Constitution does not prevent the Church from making exceptions to its policy.

cation of that policy to Deseret has a religious basis.[2] Appellees have never challenged the sincerity of the Church's beliefs, and their reliance upon exceptions to the Church's policies implementing their beliefs is simply no basis for holding now that the religious hiring preference is not based on genuine religious views. If there is a minimum threshold requirement that churches must satisfy to qualify an activity as sufficiently religious, that requirement is clearly met here. The fact that some employees of the Church's non-profit operations are not eligible for temple recommends no more undermines the sincerity of the Church's preferences based on its religious tenets than the fact that the Amish in *Yoder* were willing to permit their children to be educated in public schools through elementary grades. Notwithstanding this exception to the Amish's preference to remain largely apart from the rest of society, this Court still held that the preference was entitled to protection. 406 U.S. at 224-225.[3]

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[2] The contention by the *amicus curiae* AFL-CIO that this is not a case "in which a religious organization [has] a religious tenet requiring the employment of only its members in secular activities" (AFL-CIO Br. 11) is wide of the mark. First, it is inconsistent with the record (*see* CPB Br. 4 and authorities cited therein, especially affidavit of Wayne Nelson, ¶ 6 (R. XIV at 199.))

Moreover, even if there were no such record in this case, the determination of a church's tenets is not a matter for the AFL-CIO, the appellees or federal courts. Surely the free exercise guarantee affords churches at least as much administrative discretion to carry out broader religious objectives as federal administrators enjoy in implementing governmental policies. *Compare Udall* v. *Tallman*, 380 U.S. 1 (1965). Absent insincerity, the Church here is entitled to conform its activities to its view of religious doctrine without interference from government.

[3] Nor is it relevant to the question of infringement of religious freedoms that the Church began to enforce its employment preference during the 1970s. This Court just recently held that the First Amendment protects free exercise rights regardless of when the beliefs are adopted or exercised. *Hobbie* v. *Unemployment Appeals Comm'n*, No. 85-993, slip op. at 7-8 (Feb. 25, 1987). Appellees

Most importantly, appellees cannot and do not dispute the Church's core contention that the operation of Title VII, as implemented by the district court, infringes appellants' free exercise right to engage in religious preference hiring. The Church's religiously-based preferences have been declared unlawful; the Church is required to employ individuals who do not share the Church's values in activities related to the achievement of religious objectives and to pay them with money obtained from other members of the Church. This is a direct and substantial intrusion into the Church's religious freedom. (See CPB Br. 21-22.)

b. Appellees also argue that the district court's order does not infringe the Church's free exercise right to autonomy. They assert that all religious institutions are subjected to some scrutiny when they step into the secular world, but that such scrutiny does not violate the Constitution. Appellees urge that this Court, in cases like *Tony & Susan Alamo Foundation* v. *Sec'y of Labor*, 471 U.S. 290 (1985), has inquired into whether certain activities of religious organizations are or are not in fact religious. The district court's rule, we are assured, is nothing more than a permissible extension of those practices in another context, which still allows a church to determine such matters as who can be members, what its core beliefs will be and who can serve in minister-like positions. (Appellees Br. 7.)

What appellees ignore is that, in virtually every instance in which the government is required to scrutinize whether activities are "religious" or "secular," the reason for the inquiry does not raise free exercise questions—either the religious entity itself seeks an exemption under the Free Exercise Clause from a statute of general application or a legislature has granted "reli-

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have not and cannot dispute that the actions of the Church derive from sincere religious views and are not based merely on a "personal preference."

gious" institutions some benefit or protection and an entity claims to qualify under the relevant definition of "religious." Thus, the governmental scrutiny is at the behest of the religious organization. It is not imposed but invited. And it can be justified as required by either the Constitution or statute. See p. 10, *infra*. Here, the district court has gratuitously invaded the Church autonomy.

Moreover, in other contexts where Congress chooses to regulate religious entities, the level of scrutiny ordinarily is minimal, as in *Alamo*. The cases discussed at pages 20-21 of our opening brief establish that there is a point beyond which no governmental body may go in scrutinizing the Church and second-guessing its judgment about what is and is not religious. Here, the Mormon Church's operations have been subjected to extraordinary review by the district court. They have also been subjected to exacting review by private litigants through discovery permitted by the court below. (See CPB Br. 10-11.)[4] This Court has held that such governmental scrutiny raises a serious free exercise issue. See *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

In sum, the district court's treatment of the Mormon Church has struck at the very core of what the Free Exercise Clause reserves exclusively to the churches themselves: determining what are "the religious rituals or tenets of the religious organization," determining how well those tenets are served by particular practices and

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[4] Appellees assert that "*civil authority* must have the power independently to analyze and characterize as religious or secular the activities of religious groups" or else "religious groups would be above the law." (Appellees Br. 21; emphasis added.) But this is patently erroneous. Religious institutions still remain subject to government regulation whenever Congress has identified a sufficiently compelling interest to justify the governmental interference with free exercise rights. When it has, then the Constitution is not violated. Here Congress made the contrary judgment and chose not to regulate religion.

being free from casual interference by civil authorities. The district court's analysis, with its inquiries into whether "substantive" relationships exist between church doctrine and church practices (J.S. App. 10a-11a), clearly infringes the Church's rights sufficiently to acquire a compelling justification.

c. Once it is established that appellants' free exercise rights have been violated, then the only issue that remains is whether there is any compelling governmental justification for the infringement. In its opening brief, the Church explained that there was "no basis in precedent or logic" for the district court to ignore the judgment of Congress and itself create "a compelling interest to eliminate religious discrimination where the Congress itself had found none." (CPB Br. 22.) Appellees have not and cannot remedy this fatal defect in the district court's analysis.

The district court merely noted, in conclusory fashion, the need to eliminate discrimination based upon religion, and appellees have not cited to any constitutional or statutory interest that could justify the infringement in this case. Accordingly, appellees cannot provide any legally relevant justification for the district court's infringement of the Church's free exercise rights, and Section 702, by protecting those rights, *as Congress intended*, cannot constitute an establishment of religion in the circumstances of this case. *Zorach* v. *Clauson*, 343 U.S. 306, 312-314 (1952); *Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970).

2. Appellees cannot seriously maintain that Section 702's exemption is unconstitutional under the two-part approach of *Walz* v. *Tax Commission*, *supra*, and *Gillette* v. *United States*, 401 U.S. 437 (1971), which this Court has used to evaluate whether an express governmental exemption violates the Establishment Clause. (CPB Br. 25-38.) In contrast to the holding of the district court (J.S. App. 40a), they briefly, weakly and erroneously

maintain that Section 702 did not have a valid secular purpose.[5] (See Appellees Br. 24-25.) They then fail completely to rebut the Church's submission that Section 702 involves far less governmental entanglement with religion than the complex, three-part test created by the district court. Instead, appellees are forced to argue that the *Walz-Gillette* approach is not applicable to this case for several reasons. None is persuasive.

First, appellees attempt to distinguish *Walz* and *Gillette* (Appellees Br. 23), while completely ignoring *Bob Jones University* v. *United States*, 461 U.S. 574, 604 n.30 (1983), a recent case which followed the *Walz-Gillette* approach. (CPB Br. 32-33.) Appellees cite two "distinguishing" factors in *Walz*: (1) "the exemption was not confined to religious property," and (2) "there has been a long historical tradition of exempting religious, along with charitable and educational property, from property tax." (Appellees Br. 23.) The first attempted distinction of *Walz* is irrelevant. The second is simply not a distinction.

It is true that the exemption in *Walz* was not confined to religious property. But, while the exemption in *Walz* involved both religious and non-religious entities, that distinction does not explain *Gillette*, which involved an exemption based exclusively on religious beliefs. Nor does it explain *Bob Jones University*, 461 U.S. at 604 n.30, which, like *Gillette*, rejected a claim that an exemption for one type of religious activity, but not another, violated the Establishment Clause. The second suggested *Walz* distinction—the significance of the "long historical tradition"—cuts in favor of this statute rather than

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[5] Not only do appellees fail to rebut the Church's analysis of the legislative history (CBP Br. at 26-29), but they fail to cite to *any* statutory language or legislative history indicating a sectarian, as opposed to a secular, purpose. Their discussion of "purpose" is simply their "effects" argument under a different heading, and has no validity.

against it. Section 702 as amended was bottomed on a national tradition which for the better part of two centuries kept the federal government out of religious preference hiring. After trying it the other way for eight years, Congress decided that the traditional way was better.

Appellees also claim that this case, unlike *Walz* and *Gillette*, imposes "direct and obvious burdens on the religious liberty of others." (Appellees Br. 23.) But, as noted above, this argument that the Mormon Church is attempting to use its leverage as an employer to deprive appellees of their religious freedom seriously mischaracterizes the facts of this case as found by the district court. (J.S. App. 73a, n.69.) The argument is also inadequate as a matter of law. The decision whether to pay tithing and otherwise qualify oneself for Church employment is a decision for each individual, and a decision which these appellees have made. In exercising their choices, they have removed themselves from the private employment standards of the Church. Appellees cannot seriously maintain that *the government* is interfering with their religious liberty when it chooses not to regulate a private employment relationship which had been unregulated for 175 years. Indeed, *Gillette* holds that the incidental effect on the range of religious choice is not sufficient to invalidate a congressional exemption statute.[6] Mr. Gillette would not have lost his case—he would not have been drafted—if his religious beliefs had been different. But the incidental effect on those beliefs did not make the congressional statute coercive—or unconstitutional.[7] See also *Bob Jones University*, 461 U.S.

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[6] The effect in this case is incidental, as shown by the district court's finding that there was no evidence that appellants have used or would use their employment criteria to further adherence to religious beliefs.

[7] The Court in *Gillette* pointed out that the conscientious objector exemption (like the exemption here) "does not single out any reli-

at 603-604 (fact that denial of tax exemption would have "substantial impact" on schools segregating due to religious beliefs not relevant to Establishment Clause analysis).

Second, appellees cite a number of inapposite cases where the courts have had to draw lines between religious and secular activities. (Appellees Br. 16-21.) But such line-drawing was necessary either (a) to protect free exercise rights from a statute of general application, as when the courts have held Title VII's general ban on sex discrimination does not apply to a Church's "minister-like" functions,[8] or (b) to carry out a congressional mandate that benefits religious organizations, as when courts interpret certain definitional tax code provisions, which exempt "religious" institutions from certain requirements.[9] Such constitutionally or statutorily compelled line-drawing by courts is irrelevant to the question here of whether Congress' express determination to avoid such judicial line-drawing to advance free exercise values and avoid Establishment Clause problems violates the Establishment Clause. As we have em-

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gious organization or religious creed for special treatment." 401 U.S. at 451. The court further explained:

> "[The laws] are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial government interests that relate directly to the very impacts questioned." *Id.* at 462.

[8] *See, e.g., McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). *Cf. Tony & Susan Alamo Foundation* v. *Sec'y of Labor*, 471 U.S. 290 (1985) (applying Fair Labor Standards Act to secular activities of a religious organization).

[9] *See, e.g., Tennessee Baptist Children's Home, Inc.* v. *United States*, 605 F. Supp. 210 (M.D. Tenn. 1984), *aff'd*, 790 F.2d 534 (6th Cir. 1986).

phasized, the second part of the *Walz-Gillette* approach is satisfied because Congress' choice involves demonstrably less government entanglement with religion than the district court's test. (CPB Br. 34-38.) None of the cases cited by appellees rebuts the fundamental proposition that Congress' choice here involves less entanglement than the district court's test.

Appellees' argument thus ignores the fact that in this case—unlike any case on which they rely—Congress itself identified free exercise and Establishment Clause problems, and attempted to avoid them by an exemption. Appellees do not dispute that, under this Court's cases, Congress' judgment counts for something. Yet, under appellees' argument, it counts for nothing. Appellees fail to recognize that Congress was faced with a serious problem of constitutional dimension, and that, of the three available options (assuming Title VII's applicability to religious employers), it chose the one which least intruded into First Amendment values. (CPB Br. 15-16.) Apparently, their position is that the 1964 version of Section 702 was the only one that was constitutionally acceptable.

We submit, for reasons explained in our opening brief, that Congress made the *correct* choice when in 1972 it concluded that the amended version of Section 702 was substantively preferable to the 1964 version of Section 702, a version which required the courts to draw a line between "religious" and "secular" in the "sensitive" area of religious preference hiring. (J.S. App. 51a.) More importantly, under the approach of *Walz-Gillette*, Congress clearly made a *permissible* choice that does not violate the Establishment Clause because "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz* v. *Tax Commission*, 397 U.S. at 673.

Finally, after mischaracterizing the *Walz-Gillette* approach,[10] appellees maintain that that approach is "limitless" and would "eviscerate" the Religion Clauses. (Appellees Br. 22.) The short answer to this contention is that the Church's so-called "formula" is not its own idiosyncratic view but is instead directly derived from this Court's express exemption cases—*Walz*, *Gillette* and *Bob Jones University*. Further, the parade of purported horribles which appellees claim would result from the approach (Appellees Br. 22) have simply not occurred in the nearly two decades since *Walz* and *Gillette* were decided. As Congress' action in rejecting the broader amendment in 1972 reveals, legislatures are not prone to elevate religious values over other social concerns and thus do not lightly grant exemptions unless serious free exercise concerns are implicated, such as in the case of religious preference hiring. Moreover, rather than being "limitless," the *Walz-Gillette* approach imposes significant restrictions on legislative action. Under the approach, it is appropriate to look carefully at the purpose of a legislative act to ensure that any express exemption was enacted for a valid, secular reason. Moreover, not all exemptions would necessarily be less "entangling" than the alternatives. For example, an exemption might create a danger of political divisiveness along religious lines. *Cf. Larson* v. *Valente*, 456 U.S. 228 (1982).

In the end, there are good reasons why exemption cases should be judged by standards different from those which determine the constitutionality of governmental benefits. Importantly, as this Court has noted, the presence or

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[10] Appellees maintain that the first element of the *Walz-Gillette* approach is that "all accommodation of religion by exemption would be deemed to have a proper purpose." (Appellees Br. 22.) Of course, that is not the formulation of this Court's cases—nor of the Church's opening brief. Instead, the legislature must have acted with a valid, secular purpose, as it has in this case in seeking *both* to advance free exercise values and to avoid Establishment Clause problems.

absence of an exemption will inevitably have an "advancing or inhibiting" effect on religion, and thus a consideration of effects is not a useful inquiry in this context. (CPB Br. 23-25; 29-30.) To be sure, the feature that exemptions and benefits share in common is that, in both, government treats religious groups differently than it treats non-religious groups. The critical distinction between the two is that, at least in exemption cases such as this one, and *Walz* and *Gillette*, the difference in treatment comes about because of an attempt by the legislature to avoid a circumstance which it correctly recognized would have raised serious constitutional questions absent the exemption. And the constitutional problems sought to be avoided would result exclusively from Congress' own enactment of an alternative to the statute it finally passed. Thus, the rule that governs this case is a narrow one, tailored to its particular circumstances, and solidly supported by this Court's precedents which fit the same relevant factual pattern as this case. Appellees offer no express exemption case which applied a standard different from the *Walz-Gillette* approach, and we are aware of none.[11] Under that standard, Section 702 is constitutional.

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[11] *Larson* v. *Valente*, 456 U.S. 228 (1982), on which appellees rely, is actually authority against them. Appellees ignore the fact that the defect in the Minnesota statute in *Larson* was that "the provision was drafted with the explicit intention of including particular religious denominations and excluding others." 456 U.S. at 254. It thereby violated the "clearest command of the Establishment Clause": "one religious denomination cannot be officially preferred over another," *id.* at 244, a rule which does not apply to this case. The statute imposed registration and reporting requirements on groups engaged in charitable solicitation. It was designed to prevent fraud, and had originally exempted all religious organizations. In 1978, however, the exemption was narrowed to include only those that received more than half of their total contributions from their members. As amended, the provision was unconstitutional because it preferred some religious organizations over others. The Court's opinion makes quite clear, however, that an exemption which includes *all* religious organizations, without discrimination among

3. Moreover, even if the amended Section 702 is evaluated under the three-prong standard of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), it is clear that the provision is valid under the Establishment Clause. The principal argument appellees advance under the *Lemon* standard is that Section 702 fails to pass the second test —*i.e.*, that the effect of Section 702 is to advance religion.[12]

As demonstrated in appellants' opening brief, the "principal or primary effect" of the statute is to eliminate government interference with religious institutions. (CPB Br. 39-41.) This statute avoids the evils which the Establishment Clause was adopted to prevent; the statute involves *no* active cooperation between government and religion, *no* government subsidy to church activities, *no* attempt by government to coerce religious beliefs and *no* preference for one sect over another. *Lemon*, *supra*, 403 U.S. at 612. Appellees have made no attempt to show that Section 702 creates any of these traditional Establishment Clause problems.

With respect to the "effects" issue, appellees' principal contention is that Congress has given religious employers

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them, would be constitutional. The opinion notes, for example, that Minnesota could deny the benefits of the exemption to the Unification Church if it could prove that the Unification Church, is not a "religious organization." 456 U.S. at 255 n.30. *Larson* is further helpful because the purpose of the exemption in that case was to eliminate potential entanglement. *Cf.* 456 U.S. at 251-55 (entanglement problems of statute).

[12] With respect to the first prong, for reasons discussed above and in our opening brief, the district court correctly found that Congress acted with a valid, secular purpose when it enacted Section 702. Appellees do not even discuss the third prong—the entanglement issue. Yet, entanglement is the most serious freedom of religion issue in this case. The entanglement at issue here is that caused by an invasion of church beliefs and autonomy by the judiciary and EEOC. That unconstitutional entanglement is not something that Congress created—it is precisely what Congress attempted to avoid in amending Section 702.

an economic lever with which they can, through their employment policies, allegedly coerce conformity to religious objectives. As discussed above, this argument has no basis in the record of this case—the district court rejected the contention that the Mormon Church is using Section 702 as a lever to advance its beliefs. Nor did the district court find that Frank Mayson's free exercise rights were infringed by any governmental action. The absence of such a finding ends appellees' loosely stated "coercion" argument.

In any event, Section 702, as amended, is not coercive. All that Congress has done is to allow religious institutions to choose for themselves whether or not they prefer church members to receive the employment benefits the church itself creates. Frank Mayson remains free to believe what he wishes; he simply cannot force the Church to ignore his beliefs. The effect of Congress' decision on religious beliefs and practices is therefore remote and incidental. Certainly the effect of this exemption on religious beliefs is no greater than the effect of the exemption in *Gillette* on the views of those who only opposed certain wars on religious grounds and could therefore be drafted.

There is therefore no comparison between Section 702 and the Connecticut statute declared unconstitutional in *Estate of Thornton* v. *Caldor, Inc.*, 105 S. Ct. 2914 (1985), upon which appellees rely. (Appellees Br. 27-29.) *Thornton* involved a direct effort by the State to coerce action for strictly religious reasons. As this Court expressly held, Connecticut required "[t]he employer and others [to] adjust their affairs to the command of the State." *Id.* at 2918.[13] By contrast, Section 702 does not "command" any private individual—employer or employee —to conform his conduct to religious requirements.

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[13] Appellees' assertion that Section 702, like the law condemned in *Thornton* "is not required to protect the free exercise rights of religious employers" (Appellees Br. 28) is simply wrong. As previ-

Appellees' other assertions concerning how Section 702 "advances" religion are equally unavailing. There is simply no merit to appellees' factual contention that Section 702, as amended, gives religious employers a competitive advantage over other commercial entities.[14] The district court made no finding of fact to support appellees' claim. While appellees correctly point out that the Mormon Church owns several non-subsidized commercial enterprises, "including three television stations and twelve radio stations, extensive agri-business and commercial real estate holdings, a group of insurance companies, and a large securities portfolio . . ." (Appellees Br. 35), appellees disregard the fact that every one of those commercial activities is subject to governmental regulation, including all the prohibitions of Title VII. See CPB Br. 4, and affidavit of Wayne Nelson, ¶ 6 (R. XIV at 199.)[15]

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ously discussed in connection with the free exercise argument, appellants, who are the employers in this case, performs important ecclesiastical functions of the Mormon Church. Under the district court's holding, the identification of "the religious rituals or tenets of [their] religious organization, or matters of Church administration" as well as "the relationship between the nature of the job the employee is performing and the religious rituals or tenets of [their] religious organization" are matters to be determined by federal courts. (J.S. App. 10a, 11a.) Pronouncements concerning Church tenets and the relationships between those tenets and programs designed to effectuate them lie at the very core of these appellants' religious liberty. Yet, under the district court's test, Congress' effort to prevent federal courts from usurping that function is unconstitutional. This conclusion is manifestly wrong because Section 702's primary effect is to protect religious freedoms, while avoiding Establishment Clause problems.

[14] The argument that freeing churches, in part, from Title VII will give them an unfair competitive advantage is at odds with one of Title VII's fundamental premises—that employment discrimination is *un*economic because it prevents employers from hiring the best available employees.

[15] This case clearly does *not* require the Court to resolve the question of whether Section 702 would be constitutional as applied to

Appellees' contentions (Appellees Br. 31-32) that Section 702 delegates a governmental power to religious employers and gives their employment discrimination an official governmental endorsement are also unsupported by any district court findings and are simply wrong. For 175 years, Congress chose not to regulate religious preference hiring. In amending Section 702, *Congress*—not appellants or any other religious institutions—returned this aspect of federal law to its prior historical status. In so doing, however, Congress neither required nor endorsed religious preference hiring. Congress merely acted to prevent the interference with free exercise rights of religious institutions and avoid Establishment Clause problems which arose from the prohibitions on such a practice contained in the 1964 version of Section 702.

The point which appellees have wholly failed to address, or even to acknowledge, is that in this case, there will be effects on religion regardless of which choice Congress makes. (CPB Br. 41-43.) Given Congress' decision to enact an employment discrimination law, and to include religious employers and religious discrimination within its coverage, Congress did not have a choice between a statute that would have religious effects and a statute that would have no religious effects. Indeed, Congress' principal concern when it amended Section 702 was to eliminate an effect—judicial entanglement in church affairs—that its legislation would have on religion if there were no exemption.[16]

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commercial for-profit activities operated by a religious institution. It should be pointed out that neither appellees, nor the *amicus curiae* AFL-CIO, have been able to point to even a single instance in which the Mormon Church, or any other religious institution, has used religious preference hiring in for-profit activities or used it in such a way as to give an unfair economic advantage.

[16] Appellees do not directly address our contention (CPB Br. 41-43) that one way to analyze Section 702 under *Lemon*'s "effects" test is to compare the extent to which the "effect" of the legislation "advances" religion with the extent to which the district court's alternative "hinders" religion. 403 U.S. at 612. Under that approach,

Finally, there is no merit to appellees' argument (Appellees Br. 33-34) that Section 702 violates equal protection principles. Appellees argue that to pass constitutional muster, Section 702's religiously-based distinction must serve a compelling interest and must be the least restrictive alternative for achieving that goal. Appellees do not even address, however, appellants' argument (CPB Br. 38 n.40) that Congress had a compelling purpose in enacting Section 702 to promote free exercise values while avoiding Establishment Clause problems. Moreover, they ignore the fact that, in enacting the amendment, Congress tailored Section 702 to the problem of religious preference hiring by rejecting Senator Ervin's broader amendment that would have exempted religious institutions from *all* of Title VII's prohibitions.

4. In our opening brief we demonstrated that appellants' good faith reliance on the clear language of the Section 702 exemption should preclude an award against them. (CPB Br. 43-46.) This conclusion is strongly supported by Congress' express determination that "no person shall be subject to any liability or punishment for or on account of . . . an unlawful employment practice . . . [undertaken], in conformity with, and in reliance on any written interpretation or opinion of the [EEOC] . . . notwithstanding that . . . such interpretation or opinion is . . . determined by judicial authority to be invalid or

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appellees' claim would clearly be lacking. Appellees cannot deny that the intrusion of the district court into the Church's autonomy and religious practices is substantial. Thus, Title VII, as applied by the court, significantly hinders religious freedom. Appellees' assertions as to how Section 702 "advances" religion—granting religion a competitive advantage, encouraging religion to expand into the secular economy and permitting religion to "coerce" loyalty—are completely speculative and, as such, cannot support overturning legislation. *Larson* v. *Valente*, 456 U.S. at 249. But even if these claims were substantial, the most they do is make the balance between hindering and advancing religion close and in that situation, the Court should defer to the legislative judgment as to how best to advance constitutional values. *Gillette* v. *United States*, 401 U.S. at 460.

of no legal effect . . . ." Section 713, 42 U.S.C. § 2000e-12(b). Appellees contend that because the Church did not rely upon an EEOC opinion, but instead relied upon an Act of Congress, Section 713 is of no relevance here. (Appellees Br. 41 n.46.) This argument is based on an absurd premise. It assumes that Congress intended to give more weight to the EEOC's interpretation of Title VII than to the unambiguous language Congress itself used in enacting that Act. Had any of the appellees ever challenged the Church's employment practices before the EEOC, the Commission would have been bound by Section 702 to issue an interpretation or order denying all relief, and the Church would—without question—now be free of any liability for its religious preference hiring. Under these circumstances, Section 713 is plainly relevant to, if not dispositive of, the question of back pay here, and the district court's award of back pay must be reversed in light of that provision.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

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